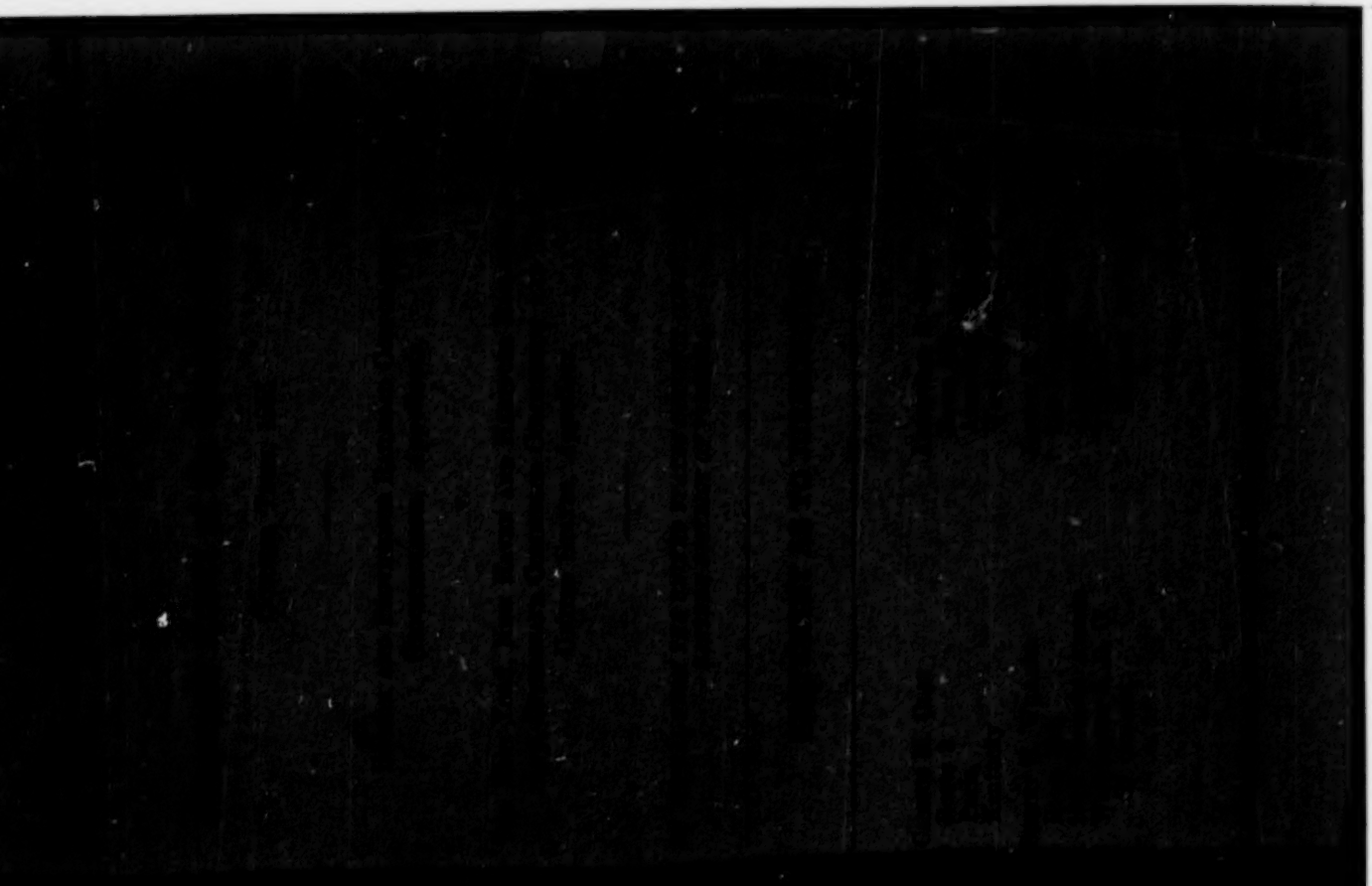

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Supreme Court of the United States

OCTOBER TERM, 1955

BOSTON AND PROVIDENCE RAILROAD CORPORATION STOCKHOLDERS, *Appellants,*

v.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, INTERSTATE COMMERCE COMMISSION AND THE UNITED STATES, *Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

STATEMENT AS TO JURISDICTION

This is a direct appeal to the Supreme Court from final orders of a special three-judge federal district court in the Eastern District of Virginia, sitting at Alexandria. Appellants submit this Statement to show that the Supreme Court has jurisdiction of the appeal, and to show that it presents substantial questions which require plenary consideration, with briefs on the merits and oral argument, for their resolution.

Appellants are a group of stockholders of the Boston and Providence Railroad Corporation. The original mem-

bers of the group filed a complaint in the Interstate Commerce Commission against The New York, New Haven and Hartford Railroad Company, asking the Commission to determine and prescribe fair divisions under the Interstate Commerce Act for their Boston & Providence Corporation from through traffic transported over the connecting lines of the two companies, principally over the New York and Boston Shore Line Route. The Commission denied relief. Appellants sought judicial review in the three-judge court, which granted defendants' motions for dismissal, refused to allow the Boston & Providence reorganization trustee to intervene as plaintiff, and taxed extraordinary costs against appellants on the ground that the action was oppressive and vexatious to the New Haven Company.

OPINIONS BELOW

The one-paragraph opinion and final order of the Commission *sub nom. Group of Boston and Providence Railroad Corporation Stockholders* v. *The New York, New Haven and Hartford Railroad Co.*, No. 31489, has not yet been reported but is appended hereto. (App. p. 1a)

The opinion which the three-judge court filed with its judgment against appellants *sub nom. Group of Boston and Providence Railroad Corporation Stockholders* v. *Interstate Commerce Commission et al.*, Civil No. 1066, has not yet been reported but is appended hereto. (App. p. 2a) The court's unreported supplemental order taxing extraordinary costs is appended hereto. (App. p. 13a) The court did not enter any findings of fact or conclusions of law apart from the appended opinion and supplemental order.

JURISDICTION

Appellants filed their complaint in the lower court under the Urgent Deficiencies Act, 28 U.S.C. §§ 1336, 1398, and 2321 to 2325, inclusive, for a permanent injunction setting

aside and annulling a final order of the Interstate Commerce Commission, whereby the Commission had dismissed appellants' complaint against the New Haven Company asking the Commission to determine and prescribe just, reasonable, and equitable divisions for their railroad corporation. The complaint to the Commission had been filed under the Interstate Commerce Act.

The three-judge court's order of dismissal was dated and entered on March 31, 1955. Appellants' timely application for rehearing and reconsideration was denied by an order dated and entered on May 6, 1955. The court considered on the merits appellants' motion to vacate the order of May 6, and denied it by order dated and entered July 1, 1955.

The application of the Boston & Providence trustee for leave to intervene as plaintiff was denied by the order of July 1, 1955, whereby the court also refused to grant the appellants' supporting motion to join the trustee as plaintiff, and denied their motion for leave to file a supplemental pleading showing their efforts to have the trustee join in maintaining the action, and also denied their motion to delete from the court's opinion its holding that the stockholder appellants lacked standing to maintain the court action.

By an order dated and entered on June 15, 1955, the court taxed appellants with extraordinary costs; and by its order of July 1, 1955, it denied their motion to amend the order and grant appellants a hearing.

The appellants filed their notice of appeal from all of the foregoing orders on July 5, 1955. They filed a supplemental notice on August 30, 1955, of an additional question presented by their appeal from the order of July 1, 1955. The notices were filed with the Clerk of the United States District Court for the Eastern District of Virginia, at Alex-

andria. The District Court enlarged the time to docket the appeal and file the record in the Supreme Court.

The jurisdiction of the Supreme Court rests on 28 U.S.C. § 1253. The appeal was timely, according to 28 U.S.C. § 2101 (b).

Cases sustaining the Supreme Court's jurisdiction of the appeal include the following:

Alton Railroad Co. v. *United States*, 287 U.S. 229;
Baltimore & Ohio Railroad Co. v. *United States*, 298 U.S. 349;
United States v. *Great Northern Railway Co.*, 343 U.S. 562.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The complaints to the Commission and the district court invoked relief under provisions of the Interstate Commerce Act which regulate rates and divisions, principally sections 1(4), 15(3), and 15(6). 49 U.S.C. §§ 1(4), 15(3), 15(6). Other portions involved include the statement of national transportation policy preceding section 1, and sections 1(18), 5(2), 6(6), 6(7), and 13(1). 49 U.S.C. §§ 1(18), 5(2), 6(6), 6(7), 13(1).

The action in the district court was brought pursuant also to the Urgent Deficiencies Act, 28 U.S.C. §§ 1336, 1398, and 2321 to 2325, inclusive. It also involved section 10 of the Administrative Procedure Act, 5 U.S.C. § 1009.

Throughout the proceedings appellants also invoked the protection of the clauses of the Fifth Amendment to the Constitution of the United States which protect private property devoted to the public transportation service from confiscation.

The denial of relief was founded principally on construing paragraph (c)(6) of section 77 of the Bankruptcy Act, 11 U.S.C. § 205 (c)(6), as depriving the Boston & Provid-

ence Corporation of the protection of the provisions of the Interstate Commerce Act regulating rates and divisions, and, by implication, the protection of the Fifth Amendment.

The major provisions involved are as follows:

CONSTITUTION

Amendment V

> . . . nor shall any person . . . be deprived of life, liberty, or property, without due process of law; nor shall any private property be taken for public use without just compensation.

INTERSTATE COMMERCE ACT

Section 1 (49 U.S.C. § 1)

> (4) It shall be the duty of every common carrier subject to this part to provide and furnish transportation upon reasonable request therefor, and to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto; . . . . It shall be the duty of every such common carrier establishing through routes to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such participating carriers.

Section 15 (49 U.S.C. § 15)

> (3) The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property by carriers sub-

ject to this part, or by carriers by railroad subject to this part and common carriers by water subject to part III, or the maxima or minima, or maxima and minima, to be charged, and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated. . . .

(6) Whenever, after full hearing upon complaint or upon its own initiative, the Commission is of opinion that the divisions of joint rates, fares, or charges, applicable to the transportation of passengers or property, are or will be unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the carriers parties thereto (whether agreed upon by such carriers, or any of them, or otherwise established), the Commission shall by order prescribe the just, reasonable and equitable divisions thereof to be received by the several carriers, . . .

In so prescribing and determining the divisions of joint rates, fares and charges, the Commission shall give due consideration, among other things, to the efficiency with which the carriers concerned are operated, the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation, and the importance to the public of the transportation services of such carriers; and also whether any particular participating carrier is an originating, intermediate, or delivering line, and any other fact or circumstance which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate, fare or charge.

ADMINISTRATIVE PROCEDURE ACT

Section 10 (~~49~~ 5 U.S.C. § 1009)

(a) RIGHT OF REVIEW.—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the mean-

ing of any relevant statute, shall be entitled to judicial review thereof.

(c) REVIEWABLE ACTS.—Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. . . .

BANKRUPTCY ACT

Paragraph (c)(6) of section 77 (11 U.S.C. § 205(c)(6)

(6) If a lease of a line of railroad is rejected, and if the lessee, with the approval of the judge, shall elect no longer to operate the leased line, it shall be the duty of the lessor at the end of a period to be fixed by the judge to begin the operation of such line, unless the judge, upon the petition of the lessor, shall decree after hearing that it would be impracticable and contrary to the public interest for the lessor to operate the said line, in which event it shall be the duty of the lessee to continue operation on or for the account of the lessor until the abandonment of such line is authorized by the Commission in accordance with the provisions of section 1 of the Interstate Commerce Act as amended.

QUESTIONS PRESENTED

1. Do the provisions of the Interstate Commerce Act regulating rates and divisions apply to an independent railroad company, after a lease of its railroad system has been terminated by rejection on the part of the former lessee's reorganization trustees, so that the liability for providing the public transportation service on the system has reverted to the owning company under the compulsions of its public franchise obligations, and its system is being operated by an operating agent appointed by the former lessee's reorganization court under paragraph (c)(6) of section 77 of the Bankruptcy Act, but solely for the account of the owning company and without expense to the operating agent?

2. Did the court below err in holding (App. p. 9a) that appellants' company may not obtain the protection of section 15 of the Interstate Commerce Act to regulate its divisions with its principal connecting carrier for the reason that the Connecticut federal court has exclusive jurisdiction to pass on the accounts for the operation of appellants' company's system by the connecting carrier according to its appointment under paragraph (c)(6) of section 77?

3. Did the lower court err in holding (App. 12a) that appellants' company has a lessor-lessee relationship with the connecting carrier operating its railroad system and therefore is not entitled to any divisions under the Interstate Commerce Act—even though the only lease of the system was terminated in 1938, and it is being operated by the connecting carrier pursuant to appointment under paragraph (c)(6) of section 77?

4. Does section 15(6) of the Interstate Commerce Act become inapplicable (App. p. 12a) to the regulation of divisions between two connecting carriers so long as they share a common operating management?

5. Did the court below err in holding (App. p. 8a) that appellants' company may not obtain the protection of section 15 of the Interstate Commerce Act to regulate its divisions with the connecting carrier for the reason that the issues raised by the appellants' complaint are *res judicata*, although no other section 15 complaint has been filed on behalf of appellants' company, no accounts dividing the revenues in question between the two companies have been adjudicated, and no basis for dividing the revenues has been adjudicated for application to the accounts?

6. Did the court below err in holding (App. p. 3a, 9a) that confiscatory divisions can be imposed upon appellants' railroad company under the guise of applying the admittedly confiscatory formula of 1938 in settling the accounts

between appellants' company and the company which is its connecting carrier and also its operating agent by court appointment under paragraph (c)(6) of section 77?

7. When the three-judge district court accepted the standing of stockholders of a railroad company in reorganization to bring a proceeding against another railroad company before the Interstate Commerce Commission, did the court err (App. p. 8a) in denying the standing of those stockholders to obtain review of an adverse order of the Commission?

8. Did the lower court err (App. p. 8a) in holding that the stockholder appellants had no standing as persons adversely affected and aggrieved by the Commission's order which dismissed their complaint against the connecting carrier for fair divisions for their railroad company under section 15 of the Interstate Commerce Act—when their company's stockholders have the only financial interest in obtaining such divisions, all of its bonds having been bought by the connecting carrier, which is also the operating agent for appellants' company railroad system by court appointment under paragraph (c)(6) of section 77, and which, despite that fiduciary position, has, as the defendant in the proceeding, a dominant conflicting interest in preventing the relief sought?

9. Did the lower court err in law or exceed judicial discretion in making *all* of the following rulings:

A. In refusing to allow the reorganization trustee of appellants' company to intervene as a plaintiff pursuant to 28 U.S.C. § 2323, on his application and the supporting application of appellants, the court having held that the appellant stockholder plaintiffs lacked standing under Civil Rule 23 to maintain the action, and the Massachusetts federal court in charge of the reorganization of appellants' company having ordered the trustee to intervene as plaintiff;

B. And in simultaneously refusing to allow the appellant stockholders to file a supplemental pleading under Civil Rule 15 (d) showing with particularity their efforts to have the trustee join as plaintiff in maintaining the action;

C. And in also thereupon denying appellants' motion to vacate its holding that they lacked standing to maintain the action?

10. Did the lower court err in law or exceed judicial discretion in holding (App. p. 13a) that appellants' action to obtain judicial review of the Commission's order was vexatious and oppressive to The New York, New Haven and Hartford Railroad Company, which intervened as a defendant under 28 U.S.C. § 2323, and for that reason taxing the appellants with extraordinary costs in favor of the New Haven Company, including attorneys' fees or salaries of its general solicitor and other lawyers—in view of the fact that the establishment of a proper basis for dividing the through revenues in question is of the utmost importance to the appellants' Boston & Providence estate, and that the Court of Appeals for the Second Circuit has already held with respect to parallel accounts that the question of rights under section 15 (6) of the Interstate Commerce Act must be raised before the Commission in the first instance, and that the Massachusetts federal court in charge of the reorganization of appellants' company after hearing appellant's arguments as to the nature and importance of the action, and after hearing the arguments of the New Haven Company that this action, and this appeal, are wanton, vexatious, and oppressive, expressly directed its reorganization trustee to intervene in the present action as co-plaintiff in order to obtain rulings on the substantive questions involved and announced that, in view of the importance of this action to the Boston & Providence estate and reorganiztion, the court's consideration of the reorganization plan will be deferred until after the issues raised in this action shall have been finally determined?

STATEMENT OF THE CASE

The appellants are stockholders of the Boston and Providence Railroad Corporation, which acquired, constructed, and owns (through its reorganization trustee) a compact assembly of railroad properties, herein called the Boston & Providence System.

I. BACKGROUND OF THE ACTION

The Boston & Providence Enterprise

The Corporation was organized in 1831 as one of the three original railroad ventures of the old Boston merchant community, to build a straight line to Providence. It was a solid financial success.

Today the Boston & Providence System consists of multiple main tracks between Boston and Providence, four short branches, and elaborate urban lands, terminal facilities, and shops—all held under the Corporation's valuable franchises received long ago from Massachusetts and Rhode Island, which the Corporation has never surrendered. The through passenger trains operated between South Station and Back Bay Station in Boston and Providence Union Station, en route to and from New York, Philadelphia, and Washington, provide a progressive inter-city service that, considering the three factors of density, modernity, and prosperity, seems at the moment to be unequaled. The dense, high-class through freight traffic uses the South Boston freight terminal and separate main tracks for nine miles, on all of which the Corporation holds a perpetual free easement, and the Boston & Providence System reaches along the central Boston waterfront through the unconsolidated subsidiary Union Freight Railroad (half-owned) to the Boston & Maine Railroad connection at North Station. The System connects with all railroads at Boston, but its most active connection for through traffic is at Providence, where it owns classification yards and extends to all tracks generally, either through

ownership or by easement, and where it connects with the main line of The New York, New Haven and Hartford Railroad Company, the principal appellee, between Providence and New York and Hudson River Trunk Line Gateways. *Boston & Providence R. Corp. Reorganization, Fourth Supplemental Report,* 290 I.C.C. 363, 364. (R. fol. 177-8. See fol. 2-4, 10, 226, App. p. 4a.)

The New Haven Company operates the entire Shore Line Route between Boston and New York, but it operates the Boston & Providence section, not for its own account, but in a separate capacity under court appointment, without expense to the New Haven estate and solely for the account of the Boston & Providence Corporation. It seems proper to describe the New Haven Company in this capacity as the operating agent, for it charges all expenses of the Boston & Providence System to the Boston & Providence Corporation, which both the Interstate Commerce Commission and the courts have held to be the originating and terminating carrier at Boston for all traffic of the Shore Line Route. *Id.,* p. 383-4 (R. fol. 187) quoting the Connecticut federal court and *Palmer* v. *Palmer,* 104 F. 2d 161, 167.

Its Remarkably High Valuation Per Share

The determination of the Interstate Commerce Commission's Bureau of Valuation for December 31, 1953, shows that the value of the tangible properties fully owned by the Boston & Providence Corporation then totaled $36,669,169, based on current market value of lands and rights and cost of reproduction less depreciation for other items. (R. fol. 470) After deducting the principal amount of the Corporation's entire funded debt, $2,170,000, the balance of $34,499,169, amounted to $940 per share for the 36,688 shares of the Corporation's old common stock which are held outside the Corporation. If the value of the easements and subsidiary interest were added the total would

undoubtedly exceed $1,000 per share, on the Bureau's basis. The par value of $100, which the shares still bear as a survival from 1831, is misleadingly low The New Haven Company owns 3,397 shares, leaving 33,291 shares (or 90 per cent) held by numerous stockholders, including the appellants. There are also 3,312 shares held for the account of the Corporation itself, of which 40 are in the treasury and 3,272 are in a sinking fund to retire the bonds. The bonds, or debentures, are called "debenture bonds", and the sinking fund is their only security. They matured in 1938, and principal and interest since then have been in default.

The Former Boston & Providence Lease of 1888

In 1888 the Corporation leased its system to the Old Colony Railroad Company (which owned an assembly of railroads south of Boston) for a term of 99 years. Thereby the lessee took over from the Corporation the primary responsibility for providing the public transportation service on the Boston & Providence System. The Corporation retired to an inactive lessor status but retained full title to its franchises and stood by as a kind of surety to Massachusetts and Rhode Island for the performance of the public service by Old Colony. The Boston & Providence operation became an operation of, by, and for the Old Colony Company—but only for the actual duration of the lease, which was fated to terminate in 1938.

The provisions of the 1888 lease recognized the value of the lessor's property. Besides agreeing to discharge the lessor's franchise obligations and maintain its railroad system the lessee paid a bonus of $1,300,000 and agreed to provide for the Corporation's organization expenses, taxes, and interest payments, plus $400,000 or $10 per share per annum on all 40,000 of the Corporation's shares. Subsequently the latter item was altered to $340,000 for dividends plus payment of all income taxes assessed against the Corporation. The reduced amount for divi-

dends came to $8.50 per share on all 40,000 shares, but was worth $9.26 per share to the owners of the Corporation, since 3,312 of the shares were held in the Corporation itself.

In addition to the foregoing amounts (which the Commission inaccurately found to be the rent) the lessee also agreed to provide for the retirement of the Corporation's entire debt and to make all improvements to the Boston & Providence System during the term of the lease, without cost to the Corporation.*

In Order to Get the Vital Boston Traffic for Its New Connecticut Shore Line Route the New Haven Company Took Over the Boston & Providence System in 1893 by Leasing the Entire Old Colony System

Before 1892 the New Haven Company was not itself a factor in Rhode Island or Eastern Massachusetts. The Boston & Providence and Old Colony Systems maintained through routes to New York and beyond via the coordinated Long Island Sound steamers which dominated the through freight and passenger traffic. See Kirkland, *Men, Cities and Transportation, A Study in New England History,* Harvard, 1948, vol. II, p. 148. In 1872 the original New York & New Haven was extended by merger to Hartford and Springfield, where it joined the east-west line of the Boston & Albany Railroad (second of the original Boston trio) to form the original all-rail line between Boston and New York. Another inland all-rail line was formed with an aggressive Boston railroad, the New York & New England. The New Haven Company, holding a monopoly entrance to New York, grew restive over dividing the Boston revenues with the Boston railroads, and resolved to drive its own route east all the

* Thus, as the debt and capitalization went *down* the value of the property went *up*, while the road was transformed from an 1888 railroad into a first class line of today. The Commission's finding of rent ignored these basic items. See *Fourth Supplemental Report*, 290 I.C.C. 363, 365 (R. folio 178).

way to Boston. First it took over the Shore Line Railroad, which ran, or, rather, "crawled fifty miles along the edge of the Sound to New London. It had a tiny traffic." Kirkland, *op. cit.* p. 83. But New London Harbor was not bridged until 1889. *Id.* p. 92. In 1892 the Company took over the independent Stonington Road from New London to Providence, and on February 15, 1893, it took over the Boston & Providence System. To do so, it had to lease the entire Old Colony System, boat lines and all.

By establishing the Boston & Providence main line as the head of its new Shore Line Route, the New Haven Company proceeded to use the great Boston traffic thus acquired—the most important traffic for the New Haven Company—as the foundation for converting the Shore Line Route into one of the world's principal through lines.

Every competing rail or water line between Boston and New York was dried up. The Shore Line Route, with the Boston & Providence main line as its head, became the backbone of transportation east of New York. The Poughkeepsie Bridge Route was re-aligned and connected with the Shore Line Route so as to make the latter dominant in western, as well as southern, freight. Thus, as the New Haven System achieved its maturity, the position of the Boston & Providence main line has become stronger and stronger.

In 1935, Following Disastrous Overexpansions the New Haven Company Went Into Reorganization and in 1936 Terminated the Old Colony Lease

Early in the Twentieth Century, the New Haven Company over-reached itself in an attempt to create a complete New England transportation monopoly, rail, water, and highway (i.e., trolley line). At its high point the New Haven monopoly stretched from the Hudson to the Bay of Fundy, but it proved to be financially disastrous. See *Financial Investigation of New York, N.H. & H. R.R. Co.,*

31 I.C.C. 32. However, the strength of the Shore Line Route kept the company from defaulting until 1935, when it petitioned for reorganization under section 77 of the Bankruptcy Act. Judge Hincks, sitting at New Haven, granted the petition and presided over the ensuing reorganization proceedings which still continue.

On June 2, 1936, the New Haven trustees rejected the Old Colony lease of 1893 and thus terminated it. Since Old Colony had become their subsidiary, it applied for reorganization in the Connecticut federal court, jointly with the parent, as a so-called "secondary debtor". Judge Hincks appointed Messrs. Palmer et al., the New Haven trustees, also to be Old Colony trustees. He appointed the New Haven trustees to operate the entire Old Colony System under paragraph (c)(6) of section 77. The Boston & Providence lease remained undisturbed; the Boston & Providence System again became an operation of and for Old Colony, but was conducted by the New Haven trustees as operating agents.

In 1938 the Old Colony Trustees Terminated the Boston & Providence Lease, Thus Forcing the Carrier Liabilities to Revert to the Boston & Providence Corporation

On July 19, 1938, the Old Colony trustees terminated the Boston & Providence lease by rejecting it on the part of the lessee, Old Colony. Thereby, the primary liability for providing the public transportation service of the Boston & Providence System, under the compulsions of the continuing Boston & Providence franchises, reverted to the B. & P. Corporation. (See Order 217, R. fol. 118.)

The rejection had been considered for more than two years. It was precipitated by the Bankers Trust Company petition for Order 217, asking for rejection. (R. fol. 99.) The Bankers Trust Company of New York acted as mortgagee for New Haven bondholders, chiefly the great life insurance companies, one of whose presidents was co-trustee

with President Palmer. To support its petition a so-called "segregation formula" was presented, dividing the Shore Line Route revenues and expenses east and west of Providence. The mortgage covered the New Haven-owned lines west of Providence. Test apportionments under the formula showed that all the income was earned on the mortgaged portion west, with nothing but hopeless deficits incurred on the leased (or formerly leased) portion east. Judge Hincks referred the formula to the Commission—not for approval, but for "recommendations" under paragraph (c)(10) of section 77. (R. fol. 114.) The Commission reported that the formula seemed as fair as the circumstances would permit, but that it did not approve the use of the formula for any substantive purpose. However, it was on the basis of the formula that Judge Hincks authorized the rejection. (R. fol. 116-118.)

The formula thus served as a legal justification for throwing away Old Colony's most valuable asset on the verge of the greatest boom in railroading. Seen in retrospect, the rejection has been widely regarded as an error.

The Present Operating Agency for the Account of the Boston & Providence Corporation

The New Haven and Old Colony reorganization judge thereupon appointed the New Haven trustees to operate the Boston & Providence System in place of the Old Colony trustees, and for the account of the Boston & Providence Corporation without expense to the New Haven estate. Thus Judge Hincks continued a centralized common operating management for all three systems, the true New Haven system, the true Old Colony system, and the Boston & Providence system. (Order 217, R. fol. 118.)

In 1947 the New Haven and Old Colony joint reorganization was declared consummated. Judge Hincks discharged the joint trustees and turned the properties of his two debtors over to the reorganized New Haven board of di-

rectors. The stepchild Boston & Providence System he also turned over to the New Haven Company, by appointing the Company as successor to the New Haven and Old Colony trustees in the operation of the Boston & Providence System, which was continued under paragraph (c)(6), apparently as a partial extension of the New Haven and Old Colony reorganization administration. The New Haven Company has continued as the operating agent under the 1947 order to this day. (Order 1007, R. fol. 143.)

Cut Off From Income at the Moment of Its 1938 Debt Maturity, the Boston & Providence Corporation Went Into Reorganization in Massachusetts

The 1938 rejection coincided with the principal maturity of the Boston & Providence debt of $2,170,000. Normally that would not have been serious, but the Old Colony trustees claimed reimbursement for $3,955,000 (or $107 per share) in alleged deficits incurred in operating the property up through 1937—on the theory that the rejection of the lease related back to June 3, 1936, when the Old Colony trustees entered into office. Meanwhile, the Corporation was cut off from income. *Fourth Supplemental Report*, p. 368 (R. fol. 179).

A petition was filed for its reorganization in the Massachusetts federal court. Judge Ford, sitting at Boston, granted the petition and appointed Messrs. Bentley W. Warren and Charles W. Mulcahy, as trustees. Mr. Mulcahy survives. He is the trustee whose application for leave to intervene in this action as plaintiff was denied by the three-judge court.

No Basis for Dividing the Revenues From the Through Traffic of the Boston & Providence and New Haven Lines Has Been Established for Application to the Agency Accounts

There has been a continuing controversy over the establishment of a proper basis for dividing the revenues from the Shore Line traffic east and west of Providence in the

trustees' accounts. The New Haven trustees submitted an account through 1937 for the entire Old Colony System, including the Boston & Providence lines. The revenues were divided according to the segregation formula, producing enormous deficits for the Old Colony operation. Judge Hincks entered Order 300, allowing the account and imposed a prior lien against the Old Colony properties to secure reimbursement to the New Haven estate. Separate lawyers retained for the Old Colony trustees protested that in dividing the joint rates the agency accounts did not conform to the standards of section 15(6) of the Interstate Commerce Act. The Court of Appeals approved the accounts and charged the deficit against the Old Colony estate, refusing to consider Old Colony's rights under section 15(6), because Old Colony had "failed to raise the point before the Commission, which ... alone could consider it initially." *Palmer* v. *Palmer*, 104 F. 2d 161, 167. "It could not later ask the district court to take these up as an original question. . . . Furthermore, we do not see how the district court could in any event proceed of itself: § 15(6) of the Interstate Commerce Act gives power to divide rates only to the Commission; and the sole alternative to the course here taken would seem to have been an independent proceeding between the two roads under that section." (p. 165)

However, by Order 301 Judge Hincks had taken that portion of the accounts covering the Boston & Providence System from June 3, 1936, through 1937, and re-charged it against the Boston & Providence estate. But in *Palmer* v. *Warren*, 108 F. 2d 164, the Court of Appeals, while affirming Judge Hincks' jurisdiction, reversed on the accounting, holding that Boston & Providence interests had not had their day in court.

> ... Boston & Providence cannot now procure any change by the Commission in the 'Segregation Formula' itself. However, we meant to decide before, and we now decide again, that the Boston & Providence is

> free to oppose the application by the District Court of that formula to the liquidation of its account with the debtors as freely as though Order No. 300 had not been issued. (p. 169)

Hearings were held on remand but were suspended following the illness of a witness. They have not yet been resumed. Thus, no agency accounts to the Boston & Providence Corporation for the operation if its system have ever been adjudicated, and no basis for dividing what Judge Hand called "the joint rates" has ever been adjudicated for "application" to the accounts. Nor has the reorganized company even filed an account for the period since 1947.

During the past seventeen years of the operating agency, the New Haven management has reported combined net railway operating income, after operating expenses and taxes, amounting to around $200,000,000 from the operation of its own lines as principal and the Boston & Providence lines as agent.* But nothing whatever has yet been paid to the Boston & Providence Corporation. Until a basis for dividing the revenues can be established according to law, the accounts will remain deadlocked.

In the present proceeding the three-judge court below has now held that the revenues must be divided according to the confiscatory formula. (App. p. 9a) But no other court has so held—nor has the Commission.

In 1954 the Commission Approved a Reorganization Plan for the Boston & Providence Corporation in Which Its Railroad System Was Valued on the Basis That It Is Being Operated at Continuous Over-All Deficits

On January 5, 1954, a majority of the I.C.C. Commissioners adopted a Fourth Supplemental Report of the Commission, approving a plan of reorganization for the

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* The figure was reached by totaling net railway operating income since 1938, from annual issues of Moody's Manual.

Boston & Providence Corporation, as proposed by the New Haven Company, which provided for a sale of the B. & P. railroad system to the New Haven Company as of the end of 1939 at a basic price of $3,980,000, according to the calculation in Commissioner Clarke's dissenting opinion. The Commission reiterated its pre-war finding that the Boston & Providence System has been operated during the agency period at substantial over-all deficits and is incapable of any earning power whatever, so that on the primary earning-power test of value in reorganization it is worthless, and its value must therefore be measured according to an offer of the New Haven which had been proposed in 1938 or 1939 and incorporated into the Commission's plan of reorganization for the New Haven Company itself as an offer to buy. *Fourth Supplemental Report*, 290 I.C.C. 363, 391, 399 (R. fol. 177, 191, 193).

II. THE PRESENT ACTION

The Appellants' Complaint

Immediately following the issuance of the Commission's 1954 Plan a group of four Boston & Providence stockholders, Messrs. H. C. Barton of Alexandria, Virginia, Alfred J. Ostheimer III of Philadelphia, James H. Sachs of Pound Ridge, N. Y., and Robert K. Straus of New York, N.Y. (who were later joined by Robert B. Eichholz of Washington, D. C., and Henry J. Stone of Manchester, New Hampshire, the Corporation's largest individual stockholder), acting on behalf of the stockholder interest, immediately took two steps.

First, they intervened in the Boston & Providence reorganization proceeding on March 8, 1954, to ask the Commission to reconsider its plan of reorganization for the reason that there was not available any lawful measure of earnings or earning power of the Boston & Providence System that could properly be used as a measure of its value—as required by the decisions of the Supreme Court

in the *Western Pacific* case (318 U.S. 448, 477) and the *Milwaukee* case (318 U.S. 523, 540).

After the Supreme Court handed down its opinion of April 5, 1954, in the Florida East Coast case (*St. Joe Paper Co.* v. *Atlantic Coast Line R. Co.*, 347 U.S. 298) the B. & P. stockholder group called the Commission's attention to the decision for its holding with respect to the forced sale of one railroad system to a connecting railroad system through the section 77 reorganization process, and for the underlying principle that section 77 of the Bankruptcy Act did not supersede or abridge the Interstate Commerce Act except where specifically provided by Congress.

The Commission, however, in its *Fifth Supplemental Report*, of July 30, 1954, (290 I.C.C. 404) upheld its *Fourth Supplemental Report*, reiterating that the Boston & Providence System has no earning power, and that it must be sold to the New Haven Company at the pre-war New Haven offer. 290 I.C.C. 404 (R. fol. 198).

Meanwhile, on March 17, 1954, the stockholder group had filed a complaint in the Commission asking it to determine and prescribe just, reasonable, and equitable divisions between the Boston & Providence Corporation and the New Haven Company. The purpose of the complaint was to secure for the owners of the Boston & Providence System the protection of the sections of the Interstate Commerce Act regulating rates and divisions, particularly section 15(6). (R. fol. 11.)

More broadly, the complaint was intended to secure for the Boston & Providence Corporation the protection of the Fifth Amendment against continued operation of its railroad system on the confiscatory basis reported by the Commission in repeated eternal-deficit findings in the Fourth and Fifth Supplemental Reports.

The relief sought by complainants was the only relief that appeared to be available to their corporation, inasmuch

as the Commission had already refused to allow the abandonment of the Boston & Providence Railroad System, and had refused, upon application of the Boston & Providence Trustee, to fix terms for an operating agreement or lease* under section 5 of the Interstate Commerce Act, (49 U.S.C. 5,) in *Boston & Providence R. Corp. Reorganization*, 275 I.C.C. 320, 275 I.C.C. 617. (R. fol. 165, 173.)

By a final order dated July 17, 1954, the Commission denied the relief sought and dismissed the complaint. Its one-paragraph opinion simply cited its own earlier decision in *Wood* v. *New York Central Railroad Company*, 286 I.C.C. 373, in which it had denied divisions to The Peoria & Eastern Railway Company (App. p. 1a).

It appeared to the stockholder group that the total effect of the Commission's denial of the relief sought was to continue to hold the Boston & Providence Corporation in bondage, by closing the last door to relief. The corporation, never having been insolvent in the bankruptcy sense, was insolvent in the equity sense only because it had been denied the protection of the Fifth Amendment and the rates and divisions sections of the Interstate Commerce Act which, in view of the dense through traffic, would insure the operation of its railroad system with revenues sufficient to cover costs and to earn a fair return.

On October 26, 1954, the stockholder group sought review of the Commission's order of July 17, 1954, in the United States District Court for the Eastern District of Virginia. A special three-judge court was convened, which heard argument on February 14, 1955, on motions of defendants to dismiss the complaint and plaintiffs' motion for summary judgment. The three-judge court entered an order on March 31, 1955, granting the motions to dismiss the complaint, and filed an opinion. (App. p. 2a)

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* In 1939 the Commission had denied the trustees' request that it determine fair earnings under paragraph (c)(11) of section 77. *B. & P. R. Corp. Reorg.*, 233 I.C.C. 467.

The Opinion Below

The three-judge court held as follows:

1. That the issues raised in the complaint had already been decided in previous decisions of the Connecticut and Massachusetts federal courts and the Commission. (App. p. 8a; cf. Question 5, *supra*.)

2. That the stockholder appellants lacked standing in court to obtain judicial review of the Commission's order, even though it was directed against them as complainants before the Commission, where their standing was established. The defect in standing was based on Civil Rule 23, which requires that stockholders suing on a claim of their corporation show their efforts to have the suit maintained by the Corporation's officers, directors, or trustees, as a condition of obtaining standing themselves. (App. p. 8a; cf. Question 7 & 8.)

3. That divisions under section 15(6) of the Interstate Commerce Act could not be obtained so long as the Boston & Providence system is being operated under paragraph (c)(6) of section 77 and the Connecticut federal court retains jurisdiction over the accounts. A basis of divisions under the Interstate Commerce Act could not be used because it would upset the divisions under the segregation formula of 1938, which the Court said apply. (App. pp. 3a, 9a, 12a; cf. Questions 1, 2, 6.)

4. That the Boston & Providence Corporation may not have any divisions under the Interstate Commerce Act because it is still a lessor and not engaged in actual transportation. (App. p. 12a; cf. Question 3.)

5. That section 15(6) of the Interstate Commerce Act applies only between railroad companies whose systems have separate managements. (App. p. 12a; cf. Question 4.)

Supplemental Orders

By a supplemental order of May 6, 1955, the three-judge court (1) denied a timely motion for rehearing, (2) granted a motion of the largest individual stockholder to join as plaintiff, and (3) granted appellants' motion to postpone the proceeding until April 30 to give the Boston & Providence trustee time to decide whether to intervene as plaintiff, but (4) denied appellants motion for a further continuance of 30 days to give time for Judge Ford in Boston to hold a hearing on appellants' petition that the trustee be instructed to join as plaintiff. (R. fol. 388-416.)

That hearing was necessary because the trustee had decided not to join, in view of the failure of his repeated efforts to rescue the property, unless instructed to join by the Boston federal court. Appellants filed a petition for instructions, but, following a request for postponement by counsel for the New Haven Company, the hearing scheduled for May 18 was not held until June 13 and 14. Appellants' petition was supported by the stockholder committee and the corporation. The New Haven Company appeared and argued that the action—and this appeal—are wanton, vexatious, and oppressive to the New Haven Company, according to an affidavit that counsel had filed in the three-judge court. On June 16, however, Judge Ford ordered the trustee to intervene before the three-judge court at Alexandria as plaintiff. (R. fol. 441-450.)

On June 15, the three-judge court entered a supplemental order taxing extraordinary costs against the appellants, including reimbursement to the New Haven Company for the services of its general solicitor, holding that the maintenance of the court action was vexatious and oppressive to the New Haven Company as intervening defendant. (App. p. 13a.)

On June 21, the Trustee filed an application to intervene as plaintiff, pursuant to the order of the Massachusetts federal court. (R. fol. 453.) The appellants also

moved (1) for leave to file a supplemental pleading under Civil Rule 15(d) setting forth with particularity their efforts to have the trustee join in maintaining the action (fol. 457); and (2) to amend the opinion by the deleting the holding that the plaintiffs lacked standing to maintain the action (fol. 471); and (3) to amend the order taxing costs by deleting the extraordinary items (fol. 472)—all in light of the Boston hearings of June 13 and 14 and Judge Ford's order. They also filed a supporting motion to joint the trustee as plaintiff and moved to vacate the order of May 6. (fol. 481-485.)

After considering the motions on the merits the three-judge court denied them all by its order of July 1. (App. p. 15a.)

ARGUMENT ON SUBSTANTIALITY

THE QUESTIONS ARE SO SUBSTANTIAL AS TO REQUIRE PLENARY CONSIDERATION BY THE SUPREME COURT WITH BRIEFS ON THE MERITS AND ORAL ARGUMENT, FOR THEIR RESOLUTION

As to Question 1: How Far Section 77 Supersedes Normal Regulation Under the Interstate Commerce Act

This appeal raises once more the general question of to what extent Congress intended that section 77 of the Bankruptcy Act should supersede the Interstate Commerce Act and the normal pattern of public regulation.

National transportation policy

The holding of the lower court would violate the national transportation policy. A major object of Congress in enacting the Interstate Commerce Act in its modern form has been to create a prosperous and healthy transportation system. Revenues are to be divided fairly between carriers, so that all the necessary segments of the nation's railroad system may endure to serve the public needs, in peacetime and wartime, without government operation. The policy is laid down in the preamble and, with respect to through

transportation, in section 1(4). The standard for dividing through revenues is particularized in section 15(6). 49 U.S.C. preceding § 1, and §§ 1(4), 15(6). The Supreme Court has recognized the policy in innumerable decisions, including, for example, the recent Montana Western divisions case, *United States* v. *Great Northern R. Co.*, 343 U.S. 562. But the decision of the three-judge court would repeal the national transportation policy with respect to the Boston & Providence Corporation—and any lessor company unfortunate enough to suffer similar indignities in the future by having the lessee's reorganization administrators similarly impound its railroad system following their rejection of the lease. After all, some of the most important railroad arteries are leased lines, such as the United New Jersey, the Philadelphia, Baltimore & Washington, the Northern Central, the Pittsburg, Fort Wayne & Chicago, the Panhandle, the Michigan Central, the Big Four, the Clinchfield, and even the Central Pacific.

Statutory construction

Nothing in the text of paragraph (c)(6) itself (*supra*, p. 7) supports the lower court's view. If there is any ambiguity in the text, the scant legislative history resolves it against the lower court. At the time of its enactment the Chairman of the Senate Committee on Interstate Commerce declared on the floor of the Senate that it was just a "minor amendment"—a characterization that Senator Wheeler would not have made if it were intended to suspend the application of the normal regulation of interstate rates (including divisions) under the Interstate Commerce Act for any railroad. See *Cong. Record*, vol. 79, pt. 13, p. 13765.

Conflict with Supreme Court decisions

The major fields of public-service regulation of railroads include regulation of their transportation services, their mergers, and their rates and divisions. The Supreme Court has already held in *Palmer* v. *Massachusetts*, 308 U.S. 79,

that section 77 of the Bankruptcy Act did not empower the federal judge presiding over the New Haven reorganization to order wholesale cancellations of local train service in Massachusetts on the Old Colony and Boston & Providence lines except in full compliance with the normal Massachusetts regulation of intrastate railroad service.

Last year, in the Florida East Coast case, *St. Joe Paper Co.* v. *Atlantic Coast Line R. Co.*, 347 U.S. 298, the Supreme Court also made it clear that Congress, by enacting section 77, had not superseded the provisions of the Interstate Commerce Act regulating railroad mergers. The Commission, acting in its special role under section 77, was not allowed to approve and certify a plan of reorganization providing a merger of the Florida East Coast with a connecting system except in full compliance with the provisions of the Interstate Commerce Act regulating mergers. Not having superseded those provisions explicitly, section 77 did not supersede them *sub silentio.*

The present appeal raises the question with respect to the normal public regulation of railroad rates, including divisions. The specific relief which appellants seek—establishment of just, reasonable, and equitable divisions for their estate because it bears the expense of providing the compulsory transportation service of its railroad system—is basic in the field of railroad revenue regulation. The principal freight traffic of eastern railroads is through traffic, and while revenues are expressed in terms of "rates, fares, and charges" (as in section 15(6), *supra*, p. 6) per unit of traffic, as paid by the public, what each carrier actually receives and retains from such traffic is expressed in terms of divisions.

Section 15 regulates divisions even more explicitly than section 5 regulates mergers. Even the counsel upholding the Commission's Florida East Coast merger plan in oral argument before the Supreme Court on the ground that section 77 superseded the provisions of section 5 regulating

mergers, when asked if he would carry his argument to the length of asserting that it also superseded the provisions of the Interstate Commerce Act with respect to "rate-making", conceded that section 77 cannot be so interpreted. (See argument of Edward Bourne, Esquire, in the *St. Joe* case, October Term 1953, No. 24, Oral Argument, page 57.)

By now deciding against that view, so as to hold section 15 inapplicable to the Boston & Providence Corporation, the lower court has disregarded the Congressional policy as expressed in section 15(6) "in a way in conflict with applicable decisions of this court" (cf. Supreme Court Rule 19)—certainly in conflict with their underlying principles.

As to Question 2: Whether the Connecticut Federal Court's Exclusive Jurisdiction to Pass on the Accounts Excludes an I.C.C. Proceeding Under Section 15(6)

The Supreme Court has already affirmed the power of the Connecticut federal court to pass on the accounts between the New Haven management and the Boston & Providence estate, so as to protect its own debtor—now its former debtor—from incurring losses through its operating agency for the account of the former lessor. *Warren* v. *Palmer*, 310 U.S. 132. But in doing so the Court did not indicate that the accounts between the two companies could depart from the Interstate Commerce Act—any more than the calculations of taxes chargeable to the Boston & Providence estate could depart from the Internal Revenue Code.*

The three-judge court now holds, however, that because the jurisdiction to pass on the accounts is vested in the reorganization court, the Commission has no jurisdiction to entertain an independent proceeding under section 15(6). Yet when a parallel question was raised with respect to the accounts for the Old Colony operation, the Court of Appeals

* The Court of Appeals affirmed Order 1007 appointing the reorganized New Haven Company to operate the B. & P. System under paragraph (c)(6) after "consummation". *In re New York, N. H. & H. R. Co.*, 169 F. 2d 337; certiorari denied, 335 U. S. 867.

said that Old Colony interests could not raise in the Connecticut federal court the question of its rights under section 15(6) in the accounting, because they had not raised the question before the Commission.

> "Furthermore, we do not see how the district court could in any event proceed of itself: § 15(6) of the Interstate Commerce Act gives power to divide the rates only to the Commission; and *the sole alternative* to the course here taken would seem to have been *an independent proceeding between the two roads under that section.*" *Palmer* v. *Palmer,* 104 F. 2d 161, 165" (italics added).

So, as the situation stands, the court having appellate jurisdiction over the Boston & Providence accounts under paragraph (c)(6) has held that an independent proceeding under section 15(6) is the way to invoke the standard of the Interstate Commerce Act for dividing the rates in the accounting under paragraph (c)(6)—while the three-judge court below has held that because of paragraph (c)(6) no independent proceeding under section 15(6) can be brought.

This is the clearest kind of conflict between courts of review dealing with the same issue, and, if only for this reason, the three-judge court's ruling raises substantial questions of law.

As to Question 3: Whether the Boston & Providence Corporation Is Now Merely a Lessor

The significance of the "lessor" status is that it would disqualify the Boston & Providence Corporation from any divisions whatever.

The three-judge court's final appraisal of the relationship between the two companies is this. "Legally B & P is still the 'lessor', and New Haven is still the 'lessee' of B & P's facilities; and they will continue so for as long as the Connecticut federal court allows the New Haven to run B & P under 77(c)(6) of the Bankruptcy Act or until the line is abandoned." (App. p. 12a.)

That view conflicts squarely with the decision of the Supreme Court in *Palmer* v. *Webster & Atlas National Bank*, 312 U.S. 156. There this Court held that the New Haven trustees or company was "merely operating the lines of those companies [including the Boston & Providence Corporation] to prevent public inconvenience" (p. 165) and not as a principal engaging in business on its own account.

When the Boston & Providence System really was leased, the Corporation was entitled to rent as fixed in the lease contract. But the whole significance of the rejection of the former lease lay in the fact that rejection terminated the lessor-lessee relationship and the contract—and left the former lessor to bear the expense of the transportation service and to derive compensation *only* from the traffic. That result was recognized in the text of paragraph (c)(6); nor was it altered by Judge Hincks' appointment of the New Haven management to conduct the operation for the owner.

The New Haven Company was never directly the lessee of the Boston & Providence System; it merely had acquired an assignment of the Boston & Providence leasehold through entering into the Old Colony lease of 1893. But the Old Colony lease was rejected—and terminated—by the New Haven trustees in 1936. So from 1936 to 1938 the New Haven Company had no possible lessor-lessee relationship with respect to the Boston & Providence lines. For the New Haven Company to have been the lessee of the Boston & Providence lines, as the three-judge court holds, would imply that Judge Hincks' 1938 order under paragraph (c)(6) created a lessor-lessee relationship. But the operation thus prescribed for the account of the Boston & Providence Corporation—without expense to the New Haven estate—is the very opposite of a lessor-lessee relationship. *A lessee operates for the lessee's account.*

As to Question 4: Whether Section 15(6) Is Inapplicable Between Railroad Companies Sharing Common Management

The three-judge court held that sections 1(4) and 15(6) of the Interstate Commerce Act apply *only* to railroads operated under separate managements, i.e., do not apply between railroads sharing common management. The court supported its novel view only by mis-stating a parenthetical dictum of Judge Learned Hand in *Palmer* v. *Palmer* that those sections apply "primarily at any rate" to roads under separate management. 104 F. 2d 161, 165.

The three-judge court's holding jeopardizes many solvent railroads, which share management services in the interest of economy and efficiency. Sometimes they are mutually independent (such as the Boston & Maine and Maine Central, which shared management until recently). If one is a subsidiary of another it usually has independent stockholders and bondholders who rely on the integrity of the divisions structure as protected by the Interstate Commerce Act to preserve the earning-power value of their property.[1] The Alabama Great Southern, the Cincinnati, New Orleans & Texas Pacific, the New Orleans & Northeastern, and the Southern railroad companies all share common management, as well as a common trade name for marketing purposes, yet they all receive divisions from through traffic shared with each other's systems. See *I.C.C. List No. of 4 of Corporate Names of Common Carriers By Rail, Express and Pipe Line Filing Tariffs, Concurrences, etc.* The list includes the Long Island, which is operated like a division of the parent Pennsylvania Railroad Company, and the New York & Long Branch, for which the Jersey Central and the Pennsylvania furnish operating management and equipment. It reports its equipment ownership as

[1] Without that protection they would be limited to relief in equity, where the parties and court would be completely deprived of the Commission's expert knowledge and judgment in a field which Congress has peculiarly entrusted to the Commission.

follows: "*Equipment*—Locomotives, none; total cars, none." See *The Official Railway Equipment Register, April 1955,* I.C.C. tariff No. R.E.R. 315, p. 542.

The Shore Line Route itself illustrates the situation. At the New York end, it is extended south from the Bronx by the line of The New York Connecting Rail Road Company, over the Hell Gate Bridge and to the Pennsylvania's East River passenger tunnels, and to the Pennsylvania's Jersey Shore freight railhead (by ferry from Bay Ridge). Its management and rolling stock are provided by the New Haven Company, but it obtains divisions (see *I.C.C. List No. 4, supra*) adequate to support its fabulous mortgage debt. See *Moody's Manual.* The Union Freight Railroad at the Boston end gets divisions similarly, although it is half owned by the Boston & Providence Corporation—which does not. The New Haven Company files common tariffs for all. Insofar as the tariffs cover Boston & Providence stations, the New Haven Company of course files them pursuant to its operating agency under its court appointment, although it prefers not to mention the B. & P. Corporation explicitly with the several other companies for which it performs the filings.

The three-judge court's position conflicts with the Commission's decision of May 18, 1954, to prescribe increased divisions for the New Jersey & New York Railroad Company, an 80 per cent Erie subsidiary, which, like Old Colony, was in reorganization jointly with the parent, in the Northern District of Ohio. When the Ohio court confirmed the parent's reorganization plan, without reorganizing the New Jersey road, it transferred the orphan to the federal court in New Jersey, which appointed a separate trustee. The increased divisions apply to through traffic shared with the Erie and New York Central systems. *New Jersey & New York Railroad Company (Peter Duryee, Trustee)* v. *Erie Railroad Company et al.,* 292 I.C.C. 479, reversing 288 I.C.C. 219, where the relationship is

explained. The Erie Company continues to provide management services and rolling stock for the New Jersey road.

If the three-judge court is upheld, all the above lines and many others, and their independent stockholders and bondholders, will be stripped of their protection under sections 1(4) and 15(6)—in utter disregard of the Congressional intent.[2]

As to Question 5: Whether the Issues Raised by the Complaint Are Res Judicata

The three-judge court said:

> "The mere relation of the facts in this case is enough to reveal that the plaintiffs' grievances have been carefully heard in behalf of B & P in the Connecticut and Massachusetts federal courts as well as by the Interstate Commerce Commission; it bares the present suit as simply another presentation of the issues already decided by those tribunals. On this score alone the complaint could be dismissed, but to be more explicit, we will rule seriatim on the points made by the pleadings." (App. p. 8a.)

Assuming that this is a holding of *res judicata*, the lower court has carried that doctrine beyond the limits recognized by the Supreme Court and by the authorities in general. *Commissioner* v. *Sunnen*, 333 U.S. 591; *Restatement of Judgments*, §§ 47, 48.

The question of how the revenues from the through traffic are to be divided has not been finally adjudicated for any year since the effective date of the termination of the

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[2] A syndicate has elected a new board of Boston & Maine directors, all pledged to elect as president Mr. Patrick B. McGinnis, who is already president of the New Haven Company. If, in this situation and others, combined operating management is conceivably desirable, that the question should be considered by the Commission and security holders without the fear that combined management might see-saw the divisions up and down to suit syndicate policy with the right to I.C.C. supervision cut off.

former Boston & Providence lease (*supra*, pp. 18-20). Order 301 of the Connecticut federal court approving accounts through 1937 was reversed by the Court of Appeals in *Palmer* v. *Warren*, and the court held that the basis of dividing the revenues was open to future consideration (*supra*, p. 19). The accounts have not been settled on remand. The questions raised by "plaintiffs' grievances" thus remain open, since there has been no final order on their merits.

As for the Massachusetts federal court, its order instructing its trustee to intervene in this action as co-plaintiff makes it clear that it does not consider the rights of the Boston & Providence Corporation under the Interstate Commerce Act *res judicata*, either by virtue of its own decisions or decisions of any other court.

Indeed, under the logic of the Court of Appeals in *Palmer* v. *Palmer*, only the Commission could provide a basis for dividing what the court called "the joint rates" according to the standard of section 15(6) of the Interstate Commerce Act. The basis could not have been determined in the first instance in either the Connecticut or Massachusetts federal court.

Aside from the present proceeding, the Commission has never passed on the rights of the Boston & Providence Corporation arising out of the joint traffic. Its "recommendations" under paragraph (c)(10)—which the three-judge court misnames as "approval" (App. p. 9a)—with respect to the segregation formula *expressly omitted* consideration of "severance value or strategic value", or "contribution of traffic originating or terminating upon particular mortgaged lines" [including also leased lines] to system earnings," or "value of particular facilities", or "effect of potential operating economies"—all of which would be required for consideration when presented as factors in a proceeding governed by the standard of section 15(6). The formula made no allowance for the Boston passenger ter-

minal costs, on the ground that "the additional time and expense . . . would not be justified." So, realizing the limitations of its coverage, the Commission was careful to state that it was not approving any substantive use of the formula. *New York, N. H. & H. R. Co. Reorganization,* 224 I.C.C. 723, 725, 729, 730. In any event, when the Commission considered the formula, the Boston & Providence Corporation was only a lessor, not entitled to divisions.

Two years later, in determining that the Boston & Providence System had no earning power whatever, the Commission emphasized that the 1938 formula did not meet the section 15(6) standard.

> If operated independently, as a connection with the New Haven, the debtor would have to depend upon the division of through rates and fares which it might secure from the New Haven. *Obviously it could not survive on the revenues assigned to it by the segregation formula and would, therefore, have to receive very much larger allowances on the through traffic than those allocated by the formula.* How much larger allowances would be necessary, or what such allowances would leave for the balance of the New Haven in ton-mile and passenger-mile earnings is not shown by the record. *Boston & Providence R. Corp. Reorganization,* 239 I.C.C. 465 at page 479.

Not only could the section 15(6) issue not have been dealt with in the Massachusetts or Connecticut federal court in the first instance, but, once properly raised in a proceeding under section 15, it could be considered on review of the Commission's order only by a special three-judge court sitting as successor to the former Commerce Court of the United States under the Urgent Deficiencies Act, 28 U.S.C. § 2325. The Connecticut reorganization judge, for example, could not by himself have reviewed the Commission's order, nor could the Court of Appeals for the Second Circuit. The rights of the Boston & Providence Corporation under the Interstate Commerce Act could be claimed and pursued

only before the Commission, and only the courts appointed by Congress were empowered to grant judicial review.

It can therefore be fairly said that until the special three-judge court below made its ruling on the appellants' complaint, no court of competent jurisdiction had ever considered the rights of the Boston & Providence Corporation under section 15.

As to Question 6: Whether Confiscatory Divisions, Otherwise Illegal, Can be Imposed in the Guise of a Segregation Formula for the Accounting Under Paragraph (c)(6)

The three-judge court held that the relief sought cannot be granted for the reason that the apportionment of revenues between the Boston & Providence Corporation and the New Haven Company is governed by the segregation formula of 1938. All parties conceded that operation under the formula would leave the Boston & Providence Corporation with over-all *operating* deficits year after year, even before its modest fixed charges, so that the Corporation would be required to serve the public on a basis of continuous confiscation.

It is axiomatic that forced operation on that basis—and the Commission refused to allow abandonment (*supra*, p. 22)—violates the Fifth Amendment to the Constitution and our most fundamental legal principles.

Undoubtedly the three-judge court would have held illegal an order of the Commission establishing confiscatory rates for the Boston & Providence Corporation. Undoubtedly it would have held illegal an order of the Commission establishing confiscatory divisions for the Corporation. *Baltimore & Ohio R. Co.* v. *United States*, 298 U.S. 349.

The question now presented is whether that which would thus be held illegal can be brought about through the use of the formula of 1938. It seems impossible that confiscatory divisions can be lawfully imposed upon a railroad

company and its owners by *any* device. And yet the effect of the three-judge court's decision is to sanction confiscatory operation under the guise of holding that the New Haven Company is to account to the Boston & Providence Corporation according to the segregation formula of 1938.

Such a result, if the decision below were allowed to stand, would expose the value of every leased line property to despoilment by the administrators of the lessee's reorganization through the same confiscatory device. The result is unprecedented and in gross conflict with everything that the Supreme Court has ever said on the subject of basic property rights under the Constitution.

As to Questions 7, 8, 9: Whether the Appellants Acquired Standing to Obtain Judicial Review, and Whether the Trustee Should Be Admitted as Plaintiff

Since the federal administrative agencies now regulate and control a vast portion of the business and financial affairs of the country, the right to obtain judicial review of agency action is enormously important, as Congress has abundantly recognized. Various statutes governing individual agencies provide for judicial review, and section 10 of the Administrative Procedure Act fortifies the right generally (*supra*, pp. 7-8).

When appellants filed their complaint with the Commission they strictly followed long-established Commission precedents, whereby security holders have standing to seek divisions for their railroad company under section 15. For example, in the case cited by the Commission as authority for dismissing the complaint, *Wood* v. *New York Central* (App. p. 1a), the action requesting divisions for The Peoria & Eastern Railway Company was brought by income bondholders. Although the Commission denied relief for other reasons, it did not intimate in its long opinion that they were not proper parties to file a complaint under section 15. Nor did the Commission suggest that the present appellants lacked standing to file their complaint (App. p. 1a).

The three-judge court now denies appellants standing to obtain judicial review. Yet if the appellants had won in the Commission, the adversary party could surely have obtained review. To allow review in an adversary proceeding to one side only—the paradoxical position of the three-judge court—means that it "has so far departed from the accepted and usual course of judicial proceedings" (cf. Supreme Court Rule 19) as to require correction. The position has no precedent. The cases mentioned by the lower court (App. p. 9a) were primarily concerned with the rights of *intervenors* before the administrative agency to obtain judicial review—not the rights of the moving party in the agency action.

The present holding squarely violates the Congressional mandate of section 10 of the Administrative Procedure Act (quoted, *supra*, pp. 6-7) that "every agency action made reviewable by statute" (such as the Urgent Deficiencies Act) shall be subject to judicial review. It also violates that provision in section 10 which grants review by right to persons "adversely affected or aggrieved" by agency action. Surely appellants meet that qualification. The agency action was directed against them personally. It condemns their company to continued insolvency, by withholding the lawful basis for dividing the revenues, which results in leaving the operating accounts deadlocked and their railroad system impounded by the hostile connecting carrier through its own phantom reorganization proceeding in Connecticut. The only escape which the Commission allows is by swallowing the connecting carrier's depression offer, which the Commission adopted in its 1940 New Haven & Old Colony reorganization plan (*New York, N. H. & H. R. Co. Reorganization*, 239 I.C.C. 337) as a firm offer to buy, but which it can justify only by blindly clinging to its eternal-deficit finding as an *idée fixe*—which would evaporate if it were to grant the appellants' complaint.

The three-judge court says that, whatever the provisions for judicial review may be, they do not supersede Civil Rule 23(b), which denies standing to stockholders suing on a secondary right *unless* they show efforts to have the corporation proceed through its officers, directors, or trustees (App. p. 8a). But Rule 23(b) applies to active corporations only, with active officers and active directors or trustees managing its affairs. The Boston & Providence officers and directors are legally inactive, by virtue of section 77. The Boston & Providence Trustee is not the sort of trustee referred to in Rule 23(b), where the word "trustees" is used because directors are legally called trustees in the District of Columbia and elsewhere. If it meant bankruptcy trustees it would have included "receivers", or reorganization courts.

But the appellants' interests are not really secondary. Actually, the stockholders have the only substantial interest in obtaining judicial review. Since the filing of the complaint, the hostile New Haven Company, although it had withdrawn its application for permission to buy the Boston & Providence bonds, nevertheless went ahead and bought them all anyway. Despite its obvious fiduciary obligations to the Boston & Providence stockholders the New Haven management is now openly governed by its dominant conflicting interest as a connecting carrier.

In order to simplify the issues appellants, following the issuance of the court's opinion, requested the bankruptcy trustee to join as plaintiff. In view of the procedural discouragements which frustrated his long succession of efforts to get relief, he decided not to join in this action without instructions from his reorganization court. At the suggestion of Judge Ford in Boston, appellants filed a formal petition for instructions (R. folio 441). The original date for hearing was postponed at the request of the New Haven Company. At the hearing on June 13 and 14 the petition

was supported by the Boston & Providence directors and a majority of its stockholders. The New Haven Company argued that the action was "wanton, vexatious, and oppressive", taking the view that by a broad application of the *pro tanto* dictum in *Warren* v. *Palmer,* 310 U.S. 132, 138, the Boston & Providence interests had lost their rights under the Interstate Commerce Act. Judge Ford, however, instructed the trustee to join in maintaining this action as co-plaintiff. The trustee's petition for intervention was filed pursuant to Civil Rule 24 and the third paragraph of 28 U.S.C. § 2323. Appellants filed a supporting motion, also moved for leave to file a supplemental complaint reporting their efforts to bring in the trustee, and moved to vacate the holding denying them standing and the order of May 6 denying rehearing and reconsideration. But, although it considered the applications on their merits, the court denied them by its final order of July 1, 1955. (App. p. 15a; R. fol. 457-486.)

The court's repeated denial of judicial review raises questions of great importance, particularly in view of the Administrative Procedure Act.

As to Question 10: The Taxing of Extraordinary Costs

Appellants say that for seventeen years the New Haven management has cleverly manipulated the reorganization process as a kind of procedural shell game. It is true that a long and dismal series of efforts has been made to extricate the Boston & Providence System from captivity. But when the three-judge court (App. pp. 13a, 15a) brands the appellants' diligent efforts to protect their common interest and the interests of their company as vexatious and oppressive to the New Haven Company, and penalizes the appellants, it has, in effect, said that the action is not in good faith and has so far departed from the accepted and usual course of judicial proceedings as to require the Supreme Court to exercise its power of supervision.

The letter of the lower court's action in taxing extraordinary costs has no precedent under the Civil Rules. Its spirit violates the holding of the Supreme Court in *Southern Pacific Company* v. *Bogert*, 250 U.S. 483, that unsuccessful attempts to secure justice do not generally bar relief that would otherwise be proper.

After all, appellants are only acting in accordance with the precept of the Court of Appeals in *Palvin* v. *Palmer*, that the way to get the benefit of section 15(6) is by bringing a proceeding under section 15(6) in the Commission. The Commission's denial results in withholding a share of the very large income from the operation of the joint Shore Line Route.

To uphold the lower court would be to discourage attempts of stockholders to protect themselves and their estates and would be contrary to any recognized principle of justice.

It is significant that the Massachusetts court ordered the trustee to intervene in this action as plaintiff after he had heard counsel for the New Haven Company present his view that the proceeding—and this appeal—are wanton, vexatious, and oppressive, and that the court announced that consideration of the plan of reorganization will be deferred until after the Supreme Court shall have given its decision on the questions presented by this appeal.

CONCLUSION

This appeal raises substantial issues of far-reaching importance in the relationships between railroad reorganization administration by the courts and the Commission and administrative regulation under the Interstate Commerce Act, as well as issues of construction of the latter, which affect a vast number of railroad security holders. It raises an issue of construction of the right to judicial review under the Administrative Procedure Act, which affects still wider interests.

From the standpoint of the Boston & Providence reorganization administration this appeal is of the utmost importance. The corporation languishes in one reorganization court while its railroad system is stranded in another. Although highly solvent in the bankruptcy sense it is without income—but only because it obtains no share of the extremely large revenues received by the New Haven Company from the operation of the joint Shore Line Route. The three-judge court says it cannot receive a fair share of the revenues—which would make it fully solvent and thus take it out of reorganization—because it is now in reorganization and operated under a paragraph of Section 77.

Appellants hope, through this appeal, to rescue the Corporation and its owners from the vicious circle. According to the three-judge court's holdings, they have no standing under the Interstate Commerce Act and no protection against confiscation through compulsory operating deficits. That court's view rests on a misunderstanding of the Supreme Court opinion in *Warren* v. *Palmer*, is contrary to the constitution and the Interstate Commerce Act, and calls for plenary review by the Supreme Court.

Respectfully submitted,

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